

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

The United States of America,

Plaintiff,

versus 3:12CV59

Commonwealth of Virginia,

Defendant

Before: HONORABLE JOHN A. GIBNEY, JR.
United States District Judge

Excerpt: Remarks from the bench

June 8, 2012
Richmond, Virginia

Gilbert F. Halasz, RMR
Official Court Reporter
U. S. Courthouse
701 East Broad Street
Richmond, Virginia 23219
(804) 916-2248

APPEARANCES

1

2

Debra J. Prillaman, Esq.
Alison Barkoff, Esq.
Benjamin O. Tayloe, Jr., Esq.
Vincent P. Herman, Esq.

4

5

6

Allyson K. Tysinger, Esq.
George Chabalewski, Esq.

7

8

Gerard T. Schafer, Esq.
Thomas York, Esq.
Christine Consiglio, Esq.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: Thank you very much.

2 You don't want to say anything, do you? All
3 right.

4 Ladies and gentlemen, first of all let me thank
5 counsel very much for an excellent presentation on
6 both sides of the issue that is not only difficult
7 from a legal standpoint, but that is emotionally
8 quite a hand full to deal with.

9 I always thank the people who are here in the
10 audience. I see the heads bobbing and shaking and so
11 forth. I appreciate your dignified approach to this
12 proceeding. I have been in cases where -- I was in a
13 case one time where somebody in the audience stood up
14 and objected to a question I asked. But all of you
15 were exceptional today and very attentive. Again, I
16 thank you very, very much for coming.

17 I am going to approve the settlement with
18 certain changes, which you probably can figure out
19 based on the questions I have been asking. There is
20 a strong presumption in favor of approving
21 settlements, in favor of settling cases, and in
22 approving of consents decrees. I think, again, the
23 issues are four in number, and they are limited in
24 scope.

25 The first question is, was the agreement the

1 result of collusion? Collusion, in this case,
2 between the Department of Justice and the
3 Commonwealth of Virginia. The answer in this case is
4 no. We have heard time and again about how the
5 Commonwealth -- first of all the federal government
6 came in and did a thorough and lengthy investigation
7 that started when Governor Kaine was in office of the
8 way Virginia runs its training centers and that whole
9 system. It found certain flaws. It presented those
10 flaws to the government, to the current
11 administration, and it set off in a lengthy -- I
12 think about a year-long negotiation -- that led to
13 the consent decree that we have now.

14 So, I think it was an arm's length negotiation,
15 and I do not believe that there was collusion in
16 reaching that agreement.

17 Second question is, is the agreement lawful? I
18 think the answer to that is yes.

19 Virginia, like any state -- well, let me back
20 up. Our society under our constitution is based on
21 principles of federalism. Federalism means that the
22 Federal Government gets to make certain decisions,
23 the state government gets to make certain decisions.
24 In this case Virginia has made what Mr. York has
25 correctly characterized as an ideological decision or

1 a political decision. That is what it is, but that
2 is their right. They have the right to use the state
3 assets for disabled people in any way that they want
4 to. Now, I am not sure that there are some outside
5 limits of cruelty and things like that that really
6 don't come into play here, but the Commonwealth is
7 certainly within its right independent of this
8 agreement, independent of an investigation by the
9 Justice Department, the Commonwealth would be within
10 its right to close down all of its ICFMRs -- which
11 is, of course, not required by this agreement -- and,
12 in fact, it would be clearly within its right for the
13 general assembly to appropriate the entire budget of
14 the Department of Health and Developmental Services,
15 they could give that entire budget to Medicaid,
16 maybe. That might not be smart, but they would be
17 able to do that. This is why this agreement is
18 lawful.

19 Is the agreement consistent with public policy?
20 Well, this ties into the question of the answer to
21 the last question, whether it is lawful. Clearly
22 there are two sides to this dispute. And there are
23 two sides to the evidence that underlies the decision
24 that has been made. We heard Dr. Anthony talk about
25 statistically how he disagrees with the savings that

1 the Commonwealth says it will make. We have heard
2 Dr. Kaul talk about his concerns about the ability to
3 treat people in the community. And we have heard
4 witnesses for the Federal Government and for the
5 Commonwealth to talk about the great advantages that
6 come from having people live outside the training
7 centers in communities.

8 So, the public policy, again, is pretty much
9 what the Commonwealth decides. And I think the
10 Commonwealth has decided in this case that the public
11 policy is that we want our disabled people to be out
12 in the community. That is, as Mr. York has ably
13 pointed out in this case, certainly a debatable
14 point. But it is only debatable. There is a
15 debate -- there are arguments on both sides. And I
16 think that, you know, there are hundreds of
17 variations of how the state can chop up its available
18 money. It could put all in the hospitals, or more
19 hospitals, less hospitals, more private ICF ID, more
20 private ICF, more group homes, fewer group homes,
21 more sponsored placements, fewer sponsored
22 placements, more aids to go into people's houses, and
23 fewer aids. You can make mix and match in many, many
24 ways. All of them reflect a valid statement of
25 public policy. And it is not for this Court to

1 decide which policy is correct. And I hold that it
2 is consistent with public policy for the state to
3 pursue the path it has chosen.

4 Finally, is the agreement fair and equitable for
5 the affected parties? With some tweaks I think it
6 is. First of all, I emphasize again, the agreement
7 does not require the closing of training centers. I
8 think, however, the Commonwealth will do that. And I
9 think it will use this agreement as a tool to do
10 that. It will save money that we are currently
11 investing in training centers, we are going to use
12 for something else.

13 But there is a protection that is available to
14 the current residents of training centers and their
15 families. And that is that they can not be removed
16 from those facilities without their consent. So, I
17 think that protection insures that these folks who
18 have retained Mr. York to come in, and who have shown
19 great interest today, and clearly a great passion
20 about this, can insure that their loved ones are
21 protected in an appropriate way.

22 And I urge them when and if this does become a
23 signed and operative agreement to take a long look at
24 what is available in the community. Their minds may
25 change. They may not. I don't know the answer to

1 that. I note, however, that the people currently
2 living in training centers are not the only people
3 affected by this agreement. Essentially the
4 Commonwealth has shut the door on the training
5 centers. Hardly anybody gets admitted these days to
6 those places. There are people out on the street in
7 the public who have -- we have heard all about this
8 God awful waiting list, and there are 3,000 people or
9 more on the waiting list who are deemed urgent.
10 Those people are affected by this agreement,
11 potentially, as much as the people in the training
12 centers. Virginia has thousands of people living at
13 home, or whatever make-shift arrangement they can put
14 together who need assistance, and who need someone to
15 help them at the heart of this case. Those people
16 are just as dramatically affected as any other
17 disabled person. And I have an obligation to be as
18 fair to them as anyone else. For that reason, and
19 because I think the agreement protects the rights of
20 people in the training centers as well as those
21 outside of it, as well as the people who are coming
22 up -- there are, you know, probably every week there
23 is someone born in the Commonwealth who would 30
24 years ago have wound up in a training center who will
25 be profoundly intellectually disabled or

1 developmentally disabled, or have any of the
2 heart-breaking ailments that we have heard about
3 today. Those people are being born all the time.
4 And we have an obligation to them to make sure
5 that that there is a way for them to live as good a
6 life as they can.

7 I want to emphasize this is a consent decree.
8 That means that I am asked approve a new way of doing
9 things. And if it does not come true, I will be
10 asked to hold the Commonwealth in contempt.

11 Let me tell the Commonwealth now, and the
12 Federal Government, there are a lot of terms in this
13 decree that simply cannot be enforced by the consent
14 power of the Court. Whether something is adequate or
15 not is just the kind of thing that is -- that I am
16 not equipped to make a judgment on and that you
17 cannot find the Commonwealth in contempt of court
18 because they don't agree with someone else's
19 interpretation of what is adequate or whatever. This
20 is analogous to our speed law. There was a time back
21 in the '70s during the first oil crisis when all the
22 speed limits everywhere in Virginia were 55. People
23 thought that was good, not only because it saved fuel
24 but because it was safe. Well, time passed and
25 people started to argue about whether 55 was safe or

1 65 was just as safe. And now, except for in urban
2 areas, most interstates have 65-mile an hour speed
3 limit. I couldn't hold the state in contempt for
4 selecting one or the other of those speed limits. It
5 is a judgment that is an exercise of governmental
6 discretion. I think that there are terms in this
7 consent decree that are as well exercises of
8 governmental discretion that are not enforceable by
9 contempt.

10 There are, however, a lot of things in this
11 consent decree that can be and will be, if necessary,
12 enforced by contempt.

13 There are also all sorts of mechanisms set up
14 for quality assurance, for planning for discharge and
15 that sort of thing. And those will be enforced, and
16 I trust from my federal friends, they will be
17 enforced vigorously.

18 Entering into this kind of order is not
19 something to be done lightly. Especially considering
20 the broad scope of people affected by the order. If
21 there is one thing I do not want to do it's to put a
22 stamp of approval on an agreement that is in some way
23 apocryphal, that makes promises that are meaningless
24 or can become meaningless. I do not want to put my
25 stamp of approval on something that is misused in

1 order to harm people in some way. I am convinced
2 from the testimony that I have received today that
3 the Commonwealth is going to live by the terms of
4 this agreement in a way that does not strip it of its
5 power and of its value. So that is one of the
6 reasons I am going to approve it.

7 I do have some suggested changes that will make
8 the agreement something that I will be willing to
9 enter and enforce.

10 First, as Mr. York has pointed out, and as I
11 pointed out in notice to the parties, the agreement
12 does not make sufficiently clear that the
13 Commonwealth must obtain the consent of training
14 center residents before changing their residences or
15 removing them from training centers. That is
16 consistent with the Olmstead case. Further, the
17 agreement does the not make sufficiently clear who
18 may consent on behalf of the residents. I assume
19 that such consent would come from the equivalent of
20 an authorized representative as defined in the
21 Department of Health and Developmental Services
22 Regulations in section 12 VAC 35-115-146. That
23 provision of who is the authorized representative
24 should be made clear, and that language from that
25 regulation should be incorporated into this decree.

1 It should also be made clear what Ms Tysinger said in
2 this case, namely that the people who are in
3 state-run facilities at this point have a right not
4 just to insist that they be held in an ICF, but that
5 they be held in a state-run ICF. This may at some --
6 now, this does not mean -- and I want to emphasize
7 this to the folks on this side of the room over
8 here -- this does not mean that you folks can go and
9 object and force the Commonwealth to keep the
10 Northern Virginia Training Center open, or the one in
11 Lynchburg, or the one in the south west -- the one
12 out in Marion -- or the one in Petersburg open. The
13 Commonwealth has the authority to allocate its
14 resources among facilities. And all that I would
15 envision being allowed to be served by this is a move
16 out of a state-run ICFMR, but you don't get to pick
17 which one you go to. That is what -- I recognize,
18 except for people in Chesapeake, that puts a lot of
19 folks in a tough spot, because their choice may
20 eventually be a private placement here in Lynchburg
21 or Fairfax, or whatever, or my relative goes to
22 Chesapeake and I don't get to them very often. That
23 is a choice -- and that needs to be specifically set
24 out in the agreement.

25 Now, the second tweak -- I guess I already

1 announced two. One is to get to stay in a state-run
2 training center; and two is the consent provision
3 needs to be made explicit.

4 The third one is this. While the settlement
5 does not require closing of training centers, it is
6 pretty clear that many residents will ultimately move
7 out of the training centers. They will be persuaded
8 in some way that that is what is best for them.
9 Their families are legitimately concerned about
10 interests when they are away from the environment --
11 about injuries, rather, that will occur while they
12 are away from the environment in which they currently
13 live. So, the settlement agreement should contain a
14 provision directing the Commonwealth immediately to
15 report any death or serious injuries of former
16 training center residents immediately to the
17 independent reviewer, who will immediately -- who
18 will in due course investigate such incident and make
19 a special report to me. That way if there is harm
20 that is occurring to people out there who have made
21 this transition, we will know it and we will address
22 it as quickly as possible.

23 Now, that means there will have to be some
24 changes to the consent decree as drafted. I don't
25 expect you to get back to me with your answers on

1 these things today. But what I would like to know is
2 how long will it take the United States and Virginia
3 to go back to their clients and see what can be
4 worked out in this respect?

5 Ms Tysinger, you said the governor is not here.
6 That is not the Governor you are talking to.

7 MS TYSINGER: I'm trying to figure out what the
8 Governor has to do, Your Honor.

9 THE COURT: How about our federal friends? The
10 changes are minimal.

11 MS BARKOFF: We will comply with the
12 Commonwealth's schedule.

13 THE COURT: Okay.

14 MS TYSINGER: Your Honor, I am told the Governor
15 is going to be gone for ten days, so logistically I
16 think two weeks once I see the language that you
17 would like added to the agreement to get it before
18 him.

19 THE COURT: Well, that is an interesting point
20 that you raise. Once you see the language that I am
21 want to see added. Because I had rather hoped you
22 would draft the language. But I will be happy to do
23 that. I would like you, if you will send me a copy
24 of the agreement in word format, I will interlineate
25 the changes.

1 MR. TAYLOE: May I speak to the last point --

2 THE COURT: Sure.

3 MR. TAYLOE: -- briefly? We would be happy to
4 take the laboring oar with the Commonwealth to come
5 up with something.

6 THE COURT: That is all right. I will be happy
7 to. Maybe you can see what I am thinking and make
8 any comments you want to on it. Let's do this. I
9 will draft that for you. I won't do it today, but we
10 will get it out next week.

11 And then by three weeks from today, which would
12 be the 29th, I would like to have a conference call
13 with Mr. York's firm, with Ms Tysinger, and the
14 Attorney General's office, and with the
15 representative of the feds, and we will talk about
16 it. If you want to, if you want to exchange a draft
17 with me between now and then, you are welcome to do
18 that so we can -- but be sure whatever language you
19 suggest that you send not only to me, not only to
20 each government entity, but also to Mr. York over
21 here. Because this business about not being able to
22 be removed from the training centers is essentially
23 what his people are in this case about, so he has a
24 vital interest in that.

25 All right any other issues that need to come

1 before me today?

2 I told Ms Burgeron this morning we would be done
3 by early afternoon. I was wrong about that. I
4 apologize to her, and I apologize to all of you for
5 the length of this proceeding.

6 Let me conclude by saying once again, that I
7 commend the people who have come here for this
8 proceeding to show their great interest. Let me also
9 say that those little blue stickers that all of you
10 have on can't be read from where I am. I have no
11 idea what they say, but I am sure they tell me to
12 rule one or the other. But I am very serious about
13 that. That you all have shown a level of care for
14 your family, of concern for your community that is
15 remarkable. I see this when I have a jury here. I
16 am amazed at how conscientious jurors are in going
17 about their task. And you all have done the same
18 thing today.

19 Finally, let me say a note on behalf of the
20 attorneys in this case. You all had a difficult task
21 in this case that I made harder by making you
22 compress everything in terms of time, and in terms of
23 the time you got to prepare for this. I commend you
24 on an excellent job.

25 Mr. York, you made the points for your clients

1 as well as you could, and it is your good efforts in
2 this case that had resulted in us changing that
3 agreement to make sure that your clients' interests
4 are protected.

5 Members of the attorneys for the Commonwealth
6 and Federal Government, clearly you all labored long
7 and hard to come up with an agreement that to your
8 way of thinking -- and not every one in this
9 courtroom agrees with it -- but that attempt to
10 protect the interests of a vulnerable population as
11 well as possible. I think that the measure of a
12 society is not how it treats its attorney generals or
13 federal judges or secretaries or commissioners, a
14 measure is how it treats its most defenseless people.
15 And what we have seen today are strong efforts to do
16 the right thing on behalf of those folks. And I
17 thank all of you.

18 Let's adjourn court.

19 Hearing adjourned

20 The foregoing is a true and correct transcript.

21

22 Gilbert Frank Halasz, RMR

23 Official Court Reporter.

24

25